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No. 83-240

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY, ET AL., APPELLANTS

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether South Dakota Codified Laws Ann. § 5-11-6 (rev. 1980) is inconsistent with the Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, and therefore invalid under the Supremacy Clause to the extent it requires that funds received by local government units under the federal statute be apportioned in the same manner as taxes are distributed.

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INTEREST OF THE UNITED STATES

The question presented by this case is whether a state statute that directs local government recipients of federal in lieu of taxes payments to distribute those funds in the same manner as general tax revenues are distributed conflicts with the scheme established by the Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.* In response to the Court's invitation, we filed a brief at the jurisdictional stage urging the Court to note probable jurisdiction and to reverse the decision of the South Dakota Supreme Court upholding the state statute against a challenge under the Supremacy Clause. The Court having determined to give the case plenary consideration, we deem it appropriate now to submit a brief on the merits.

The United States has a substantial interest in the outcome of this case. The Department of the Interior is responsible for the administration of the Payments in Lieu of Taxes Act. In our view, the state statute at issue conflicts with the language and legislative purpose of the federal statute, under which localities, not states, are to have discretion with respect to use of the federal money. Under the decision of the court below, localities will be deprived of this discretion, with the result that local services of importance to activities on federal lands may be underfunded. Moreover, other states may look to the decision below as justification for enacting similar statutes, thus undermining further the congressional purpose.

STATEMENT

1. The Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*,[1] requires the Secretary of the Interior to make annual payments to local governments within whose boundaries the United States owns tax-exempt federal "entitlement lands."[2] Eligible units of local government include counties, towns and other general purpose political subdivisions of a state, but not

[1] Title 31 of the United States Code was recodified in 1982 by Pub. L. No. 97-258, 96 Stat. 877 *et seq.* The recodification did not make any substantive change in the law. See H.R. Rep. 97-651, 97th Cong., 2d Sess. 3 (1982). The Payments in Lieu of Taxes Act now appears at 31 U.S.C. 6901 *et seq.*, instead of 31 U.S.C. (1976 ed.) 1601 *et seq.*

[2] 31 U.S.C. 6902(a) provides:

> The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose.

special purpose public bodies, such as school boards.[3] The purpose of this Act is to compensate local governments in part for the loss of tax revenues resulting from the tax immunity of such federal lands. See pages 4-5, 13-17, *infra*. The lands to which the Act applies include wilderness areas and other lands within the National Park System and National Forest System, lands administered by the Bureau of Land Management, lands used by the Army Corps of Engineers for water resource development projects and dredge disposal areas, and lands on which semi-active and inactive military installations are located. See 31 U.S.C. 6901(1). These lands total over 450 million acres. Payments under the Act amount to almost $100 million annually and are made to approximately 1,700 counties, located in 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. See Division of Finance, Bureau of Land

[3] 31 U.S.C. 6901 (as amended by Pub. L. No. 98-63, § 3(1), 97 Stat. 323) provides in pertinent part:

> (2) "unit of general local government" means
>
> (A) a county (or parish), township, borough existing in Alaska on October 20, 1976, or city where the city is independent of any other unit of general local government, that: (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term "governmental services" includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation and governmental administration * * *.

Management, U.S. Dep't of the Interior, *Payments in Lieu of Taxes, Fiscal Year 1983*, at 1.

The Payments in Lieu of Taxes Act was the product of many years of consideration at the federal level.[4] Over the years Congress has enacted a number of different impact aid programs designed to compensate states and localities for loss of tax revenues resulting from the tax immunity of federal lands.[5] But the revenues that fund those impact aid programs generally are derived from income-producing activities on federal lands, such as oil and gas leasing, mining, and grazing, and the payments are therefore likely to vary from year to year. Moreover, in a number of instances, funds paid under the impact aid programs are earmarked by statute for particular purposes, such as the building of public roads or the support of public schools. See S. Rep. 94-1262, 94th Cong., 2d Sess. 7 (1976). In 1964, Congress established the Public Land Law Review Commission and

[4] The problem of the effect on state and local governments of the tax immunity of federal lands within their boundaries has existed for many years. In 1806, the Attorney General issued the first legal opinion regarding nontaxability of federal lands by state governments. 1 Op. Att'y Gen. 157 (quoted in *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 163 (1886)). This Court's opinions in *Van Brocklin* and in *Wisconsin Central R.R.* v. *Price County*, 133 U.S. 496 (1890), established the "inflexible rule, with no exceptions, that property of the Federal Government may not, absent the express consent of the Government, be taxed by a State or subdivision thereof." *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Pt. II, at 267 (1957).

[5] 31 U.S.C. 6903(a)(1) contains a partial listing of these impact aid programs.

assigned it the task of reviewing the full range of laws applicable to federal lands and recommending any needed revisions.[6] The Commission's review included consideration of the shortcomings of the various programs under which states and localities received federal payments on account of the tax immunity of federal lands within their boundaries.

In its 1970 final report, the Commission concluded that "it is the obligation of the United States to make certain that the burden of [the policy of retaining lands under federal ownership] is spread among all the people of the United States and is not borne only by those states and governments in whose area the lands are located. Therefore, the Federal Government should make payments to compensate state and local governments for the tax immunity of Federal lands." Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* 236 (1970). The Commission recommended replacement of the numerous revenue-sharing statutes then on the books with a single payment in lieu of taxes. However, Congress concluded that it was not feasible at that time to repeal the existing impact aid programs. S. Rep. 94-1262, *supra*, at 11. Instead, in 1976, Congress passed the Payments in Lieu of Taxes Act, which provides for a minimum level of payments to local government units to compensate partially for lost revenues not covered by payments received under other federal statutes.

2. In 1979, the State of South Dakota enacted a statute requiring local governments to distribute federal and state payments in lieu of taxes in the same way as general tax revenues are distributed. S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) provides:

[6] Pub. L. No. 88-606, 78 Stat. 982 *et seq.*

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

Since appellant Lawrence County allocates to its school districts approximately 60% of general tax revenues, the South Dakota statute effectively requires it also to apportion to the school districts 60% of the federal in lieu of taxes payments it receives.

3. Lawrence County originally brought an action in the United States District Court for the District of South Dakota seeking a declaration that the state statute is in conflict with the Payments in Lieu of Taxes Act and is therefore void under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2). The district court held that the federal statute vests total discretion in the counties with respect to distribution of federal in lieu of taxes payments and that the states may not dictate the manner of distribution. The court therefore declared the South Dakota statute void insofar as it affects distribution of funds received under the Payments in Lieu of Taxes Act and granted summary judgment for Lawrence County. *Lawrence County* v. *South Dakota*, 513 F. Supp. 1040 (D.S.D. 1981). However, the United States Court of Appeals for the Eighth Circuit vacated the district court judgment on the ground that the County's invocation of the Supremacy Clause did not convert the action into one arising under federal law for the purpose of federal jurisdiction under 28 U.S.C. 1331. *Lawrence County* v. *South Dakota*, 668 F.2d 27 (1982).

4. Lead-Deadwood School District No. 40-1, appellee in this Court, then filed a complaint for writ of mandamus in the Circuit Court for the Eighth Judicial Circuit of South Dakota, seeking to compel Lawrence County to distribute federal in lieu of taxes funds according to S.D. Codified Laws Ann. § 5-11-6 (rev. 1980). The trial court declined to issue the writ, citing the Payments in Lieu of Taxes Act (J.S. App. 8a-10a). The court held that the South Dakota statute stood as an "obstacle to the accomplishment and the execution of the full purposes and objectives of Congress and as such is unconstitutional and void under the supremacy clause of the federal and state constitutions" (J.S. App. 10a).

The Supreme Court of South Dakota reversed (J.S. App. 1a-7a). Because the State Supreme Court found the language of the federal statute to be "plain, clear and rational" (*id.* at 3a), it concluded that review of the legislative history was unnecessary. The court found no conflict between the state and federal statutes, reasoning that the federal statute required only that payments be used for a governmental purpose and that support of schools is a valid governmental purpose (*id.* at 4a). Two justices dissented on the ground that the federal statute as a whole, along with its legislative history, indicated that "Congress intended [that] the county be vested with total discretion in distributing [federal in lieu of taxes] funds" (*id.* at 6a).

SUMMARY OF ARGUMENT

Under the federal Payments in Lieu of Taxes Act Congress conferred discretion on local governments to decide how they wish to spend the federal funds they receive under the Act. Because S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) limits the manner in which local governments may apportion those federal funds, it conflicts with the congressional purpose and is therefore invalid under the Supremacy Clause.

A. The language of the Payments in Lieu of Taxes Act indicates that the local government recipients of funds under the Act are to have complete discretion in determining how to allocate those funds. Under the Act, recipients (which must be general government units, rather than special purpose units such as school districts) "may use" payments under the Act "for any governmental purpose."

B. Even if the language of the statute were not decisive on this point, the legislative history makes clear that Congress intended that local government recipients have discretion in allocating federal payments under the statute. Committee reports and congressional debate indicate that there were to be no restrictions on use of the funds and that the payments were designed to enable local governments (as opposed to states) to meet a wide range of governmental needs related to activities on federal lands.

C. The Department of the Interior has consistently interpreted the Payments in Lieu of Taxes Act as requiring that payments under the Act be made to general purpose local government units and that those units retain the discretion to use the funds for any governmental purpose. That interpretation of the Act by the agency charged with its administration is entitled to deference.

D. The South Dakota statute interferes with the congressional purpose, even though it does not prescribe any particular formula or specify the programs for which the funds must be expended. The requirement that the federal payments be distributed in the same manner as taxes may prevent a local government from using federal funds where they are needed most. It is doubtful that local governments could adjust their budgets in advance to offset the effect of the state-mandated distribution scheme for

federal payments; in any event, local governments receiving those funds should not be required to engage in complex budgetary maneuvers in order to circumvent state intrusion on the federal program.

ARGUMENT

THE SOUTH DAKOTA STATUTE FRUSTRATES THE PURPOSES OF THE FEDERAL PAYMENTS IN LIEU OF TAXES ACT BY DEPRIVING LOCAL GOVERNMENT RECIPIENTS OF FEDERAL PAYMENTS OF DISCRETION IN DETERMINING HOW TO SPEND THOSE FUNDS

The South Dakota Supreme Court erred in holding that S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) is consistent with the federal Payments in Lieu of Taxes Act. The federal statute is properly read as conferring discretion on local governments to determine how they will spend the federal payments they receive under the statute. Because the state statute requires local governments to apportion those payments in a particular manner, it conflicts directly with the mandate of the federal statute and interferes with the accomplishment of Congress's goals.

It is well settled that " 'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress.' " *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980) (quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943)). Where possible, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973) (quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963)). Nevertheless, this Court has frequently reiterated that a state statute is void if it "stands as

an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, No. 81-1945 (Apr. 20, 1983), slip op. 11; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, to determine whether state and federal laws are in conflict it is necessary first to "ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9. See also *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

In light of these principles, we show below that the South Dakota statute is invalid under the Supremacy Clause to the extent it mandates a particular allocation of payments received by local governments under the federal statute.

A. The language of the Payments in Lieu of Taxes Act indicates that local governments that receive funds under the Act are to have complete discretion in expending or allocating those funds. 31 U.S.C. 6902(a) states that units of local government "may use" payments under the Act "for any governmental purpose." The import of this broad language is that recipients of federal payments may choose how to apply them, so long as the funds are used for some valid governmental purpose. There is no suggestion in the language that any entity other than the recipient

may impose constraints on the manner in which the payments are spent.

The federal statute also makes it clear that payments are to be made directly to general government units, not to special purpose units such as school districts; indeed, appellee has admitted as much (Mot. to Aff. 2, 7). Under the recently amended version of 31 U.S.C. 6901(2), a "unit of general local government" is defined as a political subdivision that is "the principal provider * * * of governmental services" (including, *e.g.*, public safety, social services, and transportation) within a state. The previous version of Section 6901(2) defined "unit of general local government" as a "general purpose political subdivision of a State." Thus, it is general purpose units, such as appellant Lawrence County, that are entitled to receive the federal funds and to decide how they will be spent.

While a county may choose to allocate some federal in lieu of taxes funds to school districts, it need not do so. In explaining the Payments in Lieu of Taxes Act, the court in *Altus-Denning School District No. 31* v. *Franklin County*, 568 F. Supp. 95, 101 (W.D. Ark. 1983), correctly noted (emphasis in original):

> [E]ven though Congress no doubt intended for some of the in lieu of tax funds to go to school districts, believing that the counties would disburse these funds with prudence, equity, and an eye to the obvious needs of the school districts, Congress nonetheless expressly allowed whichever unit constitutes the "unit of local government" of [31 U.S.C. 6901] to expend these funds for *any* governmental purpose.[7]

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[7] Ark. Stat. Ann. § 80-726 (repl. 1980), the state statute at issue in *Altus-Denning School District No. 31*, required county

See also *Kendall* v. *Towns County*, 146 Ga. App. 760, 762, 247 S.E.2d 577, 579 (1978).[8]

The South Dakota Supreme Court construed the language of the Payments in Lieu of Taxes Act as signifying only a requirement that funds be used for some governmental purpose, reflecting congressional indifference whether the funds were ultimately paid over to school districts or some other public body. In the court's view, the language of the federal statute does not preclude a state requirement that local governments pay the federal funds to school districts.[9]

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treasurers to apportion to school districts any funds received from income from national forests. The district court concluded that, assuming arguendo that the Arkansas statute applied to funds under the Payments in Lieu of Taxes Act, the state statute would be invalid under the Supremacy Clause because it would conflict with the "any governmental purpose" language of the federal statute. 568 F. Supp. at 102.

[8] Another provision of the federal statute, 31 U.S.C. 6904(b), provides additional support for this conclusion. Section 6904(b) provides expressly that in the case of certain additional short-term federal payments in connection with acquisition of park or wilderness areas, the Secretary "shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest." The express directive in Section 6904(b) reinforces the conclusion that Congress did not wish funds authorized under 31 U.S.C. 6902(a) to be earmarked for school districts, but rather intended for local governments themselves to have the discretion to allocate such funds. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

[9] The South Dakota Attorney General has also suggested that the federal statute does not make it unlawful for a state legislature to require that federal in lieu of taxes payments be used in a manner similar to other tax monies raised by the county. 1979-1980 S.D. Att'y Gen. Biennial Rep. 147, 149 (Official Op. No. 80-12). That opinion notes (*ibid.*), however,

It is conceivable that the words "may use" in 31 U.S.C. 6902(a) could be read in the manner chosen by the South Dakota Supreme Court. Cf. H.R. Rep. 97-651, 97th Cong., 2d Sess. 2 (1982). However, in our view, this reading of the federal statute is not the most natural one. The words "may use," employed in conjunction with the reference to "any" governmental purpose, appear on their face to give local governments the discretion themselves to choose the governmental purposes for which they will use the funds.

B. Even if the language of the Payments in Lieu of Taxes Act were not decisive, the legislative history clearly supports our reading of the statute.[10] That history indicates that Congress intended not only that local governments receive increased levels of federal funding as a result of the Payments in Lieu of Taxes Act, but also that they have discretion in allocating those funds. Both congressional committees that considered the legislation stated unequivocally that "payments under [the Payments in Lieu of Taxes Act]

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that "it is not the role of the Attorney General's Office to advocate the unconstitutionality of state statutes."

The South Dakota Attorney General was notified of the challenge to the state statute in this case (see J.S. App. 9a), but apparently chose not to participate. The State was a party to the earlier proceedings in federal court. See page 6, *supra*.

[10] The South Dakota Supreme Court found it unnecessary to examine the legislative history because it viewed the language of the statute as "plain, clear and rational" (J.S. App. 3a). As we have shown, the court appears to have misread the statutory language. But in any event, the court clearly erred in declining to examine the legislative history and underlying purpose of the statute. See *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 15-16; *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-11 (1976).

should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purposes." S. Rep. 94-1262, *supra*, at 15; H.R. Rep. 94-1106, 94th Cong., 2d Sess. 12 (1976). During both the House and Senate debates, the legislation was described by its sponsors as giving local governments the discretion to determine how the funds should be spent. Representative Quillen stated: "The funds are not earmarked for specific purposes such as roads or schools. Rather, *the local governments are given the discretion to use these moneys as they determine*, which is as it should be." 122 Cong. Rec. 25742 (1976) (emphasis added). Senator Moss explained: "Payments under H.R. 9719 are to go directly to the units of local government since it is the local governments that assume the burden for the tax immunity of these lands and *the payments may be used for any purpose the receiving governmental unit determines.*" *Id.* at 34596 (emphasis added).

In providing that local governments were to be the recipients of the payments under the new statute, Congress expressly rejected as unsatisfactory the scheme of many of the existing impact aid programs under which states (rather than local governments) received funds and decided how they would be distributed. S. Rep. 94-1262, *supra*, at 9 (noting that, under existing programs, "[i]n far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those

in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt"); *id.* at 15.[11] The Senate committee noted that it is local governments that bear the burden of providing a wide variety of services related to the presence of federal land within their boundaries (*id.* at 8-9):

> These lands attract thousands of visitors each year, yet the intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands.

Congress also expressed dissatisfaction with the earmarking of funds that had resulted either from federal statutory requirements or the fact that states controlled the distribution of funds under some programs. The Senate committee noted that use of funds under existing programs was often restricted to construction and maintenance of roads and schools (S. Rep. 94-1262, *supra*, at 9), but that the range of local government needs was in fact much greater (*ibid.*):

> [L]ocal governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recrea-

[11] Contrast, *e.g.*, *Rogers* v. *Brockette*, 588 F.2d 1057, 1071-1073 (5th Cir.), cert. denied, 444 U.S. 827 (1979), in which the court found no indication that Congress had intended to exclude states from the administration of a federal subsidy program.

tion; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

In addition, Members of Congress called attention to the budgeting difficulties created by the fluctuations in revenue under existing impact aid programs and the need of local governments for funds that could be applied flexibly to fund priority projects. See, *e.g.*, 122 Cong. Rec. 25747 (1976) (statement of Rep. Weaver) (noting fluctuations in revenue under existing impact aid programs); *id.* at 25752 (statement of Rep. Alexander) (noting immediate need for federal payments to continue construction of a new school building in Stone County, Arkansas, since maximum allowable increase in local taxes did not yield sufficient funds); *id.* at 25755 (statement of Rep. Holt) (noting difficulties caused by annual fluctuations in impact aid).[12] Thus, it was an important purpose of the new statute to give local governments control over federal funds and the freedom to allocate them in a manner that would allow satisfaction of the wide range of needs for governmental services that arise from the presence of federal lands. See *id.* at 25754 (statement of Rep. McCormack)

[12] See also *Payments in Lieu of Taxes: Hearings on H.R. 9719 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 146 (1976) (statement of Kenneth Lee, Lincoln County commissioner) (noting that "five or six different things hit us in one year," including a criminal trial costing the county $25,000 for a transient murder committed in Lincoln County); *id.* at 280-281 (statement of Rep. Simon) (noting need for flexibility in distribution of federal funds, since "the need in Pope County is not for the schools").

(new legislation "will now assure the counties a definite amount that will not fluctuate with lease production abilities and will not be specifically earmarked for schools and roads but can be expended on the basis of priority need so that each county can now budget accurately").

A subsequent amendment to the Payments in Lieu of Taxes Act sheds further light on Congress's intent in enacting the original statute. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). In 1983, Congress amended the Act to authorize states to make limited redistributions of payments among units of general purpose local government within the same county. Pub. L. No. 98-63, § 3(4), 97 Stat. 324, to be codified at 31 U.S.C. 6907. See J.S. App. 36a. The 1983 amendment was passed in response to *Meade Township* v. *Andrus*, 695 F.2d 1006 (1982), in which the Sixth Circuit held that the Secretary of the Interior had exceeded his authority under the Payments in Lieu of Taxes Act in refusing to provide for payments to townships as well as counties in Michigan. See 129 Cong. Rec. S8444 (daily ed. June 15, 1983). The fact that Congress found it necessary to provide expressly that a state may reallocate funds received by local governments in specified circumstances lends additional weight to the conclusion that, in the absence of such a provision, Congress did not intend that states be able to dictate the distribution of in lieu of taxes payments.

C. The Department of the Interior—the agency charged with administration of the Payments in Lieu of Taxes Act—has consistently interpreted that statute as requiring that federal payments be made to general purpose local government units and that those units retain the discretion to use the funds for any governmental purpose they choose. The Department promulgated 43 C.F.R. Subpt. 1881 in 1977, soon

after passage of the Act. 43 C.F.R. 1881.0-5(b)(2) makes clear that school districts may not receive funds directly. It provides: "The term 'unit of general government' excludes single purpose or special purpose units of local government such as school districts or water districts." See also 42 Fed. Reg. 51580, 51581 (1977) (counties are the appropriate recipients of in lieu of taxes funds in South Dakota). 43 C.F.R. 1881.2 states that payments made to local governments (with the exception of the special payments authorized by 31 U.S.C. 6904(b)) may be used for any governmental purpose.[13] The Department's interpretation of the Act as foreclosing either direct payments to school districts or limitations on use of the funds is entitled to deference. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[14]

D. Appellee appears to contend (Mot. to Aff. 8-9) that the South Dakota statute does not interfere significantly with the discretion of counties to allocate

[13] See also 58 Comp. Gen. 19, 24 (1978), in which the Comptroller General, in the course of responding to an inquiry from the Interior Department concerning computation of federal in lieu of taxes payments, noted that it was "obvious" from the legislative history that Congress was concerned that such funds "should be distributed to the local governments, who then were to make the necessary decisions on how to distribute them to meet their internal needs."

[14] Two courts have found the Secretary's regulations to be consistent with the federal statute in not requiring payment of federal in lieu of taxes funds to school districts. See *Altus-Denning School District No. 31* v. *Franklin County*, 568 F. Supp. at 101; *Kendall* v. *Towns County*, 146 Ga. App. at 762, 247 S.E.2d at 579.

the federal payments they receive, since the state statute does not prescribe any particular formula or specify the programs for which the funds must be expended, but merely directs the recipient counties to allocate the federal moneys "in the same manner as taxes are distributed." But however appropriate that general direction may appear on a superficial glance, it nevertheless represents a not insignificant limitation on the discretion of counties to choose how they will spend the federal payments. A county's needs may not necessarily correspond to the manner in which its taxes are distributed. For example, an unexpected need for funding a particular activity (*e.g.*, a trial in connection with a major crime committed by a visitor to a national forest) might prompt a county to devote all of its federal in lieu of taxes payments to that activity in a particular year. See page 16 & note 12, *supra*. Alternatively, state statutes may require that some programs be fully funded by local taxes, so that the county normally would choose not to devote its share of federal in lieu of taxes payments to those programs, but instead to cover shortfalls in other programs. For example, South Dakota law appears to require county auditors to set a levy on taxable property at a rate sufficient to meet the school budget. S.D. Codified Laws Ann. §§ 10-12-29, 13-11-3 (rev. 1982). See *Rapid City Area School District No. 51-4* v. *Pennington County Auditor*, 284 N.W.2d 308 (S.D. 1979). To the extent S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) prevents counties from applying the federal in lieu of taxes payments to programs for which the funds are most needed, it frustrates Congress's intent that local governments have such discretion and that they have funds that could be used to provide the services

to federal lands with which Congress was most concerned.[15]

It might be argued that a county could use creative budgeting to avoid the effect of the state restriction on allocation of federal payments. We doubt that such an approach would be feasible. As noted above, there are state statutes governing funding of the school budget. Thus, a county apparently may not reduce a school district's share of local taxes in anticipation that federal in lieu of taxes payments would meet any shortfall. Even if counties were free to expend or allocate locally raised taxes as they wished, it is doubtful that they would be able to adjust their tax distribution plans in such a way as to avoid any increment to a fully funded activity (*e.g.*, a school district) by virtue of the federal payments. As Congress recognized (see page 16, *supra*), county revenues, including other federal impact program funds, some of them specially earmarked, vary from year to year.[16] Counties must budget in advance, often long

[15] The South Dakota Supreme Court appears to have believed that a conflict between the federal and state statutes would not exist unless Congress had actually prohibited federal in lieu of taxes payments from being used for school districts. See J.S. App. 4a. This overlooks the importance of Congress's concern that local governments themselves exercise discretion in choosing how to allocate the federal payments. As we have explained, such discretion can be of considerable significance in enabling a local government to meet the need for services created by the presence of federal lands within its boundaries. A state statute that limits local government discretion can therefore be regarded as conflicting with the congressional scheme, even in the absence of any express prohibition on use of the federal funds.

[16] Thus, counties are subject to greater uncertainty in budgeting than if they received a single federal payment measured as the equivalent of the amount they would receive if federal lands were subject to local taxation.

before they actually receive federal impact aid funds or in lieu of taxes payments. Moreover, the State presumably retains power to control a county's expenditure of nonfederal funds and might well intervene if a county were seen to be evading the intent of the State directive.

At all events, the counties receiving in lieu of taxes payments from the United States ought not be pushed into complex schemes to circumvent state intrusion. The purpose of these federal payments is to give local governments a minimum amount of federal money to use at their discretion to fill in gaps, to reduce fiscal and budgetary swings, and to allow more effective planning. This can be accomplished only through local control and decisionmaking, unconstrained by directives contained in state statutes.

E. It is thus clear that S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) conflicts with the federal Payments in Lieu of Taxes Act. The South Dakota statute requires localities to expend the federal in lieu of taxes payments in a particular manner; that is inconsistent with the language and legislative purpose of the federal statute, under which local governments are to have discretion in apportioning the payments. The federal statute, read in the light of the underlying congressional purpose, leaves no room for such state interference with local discretion. Cf. *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 318; *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 583-585 (1979); *Hergenreter* v. *Hayden*, 295 F. Supp. 251 (D. Kan. 1968); *Shepheard* v. *Godwin*, 280 F. Supp. 869 (E.D. Va. 1968).[17] Since the va-

[17] In *Hergenreter* and *Shepheard*, state statutes required deduction from a school district's share of state educational funding of amounts equivalent to certain federal payments made to school districts impacted by the presence of federal

lidity of the federal law is not in doubt,[18] it follows that, to the extent the South Dakota statute purports to affect the distribution of federal in lieu of taxes payments, it is invalid under the Supremacy Clause.

CONCLUSION

The judgment of the South Dakota Supreme Court should be reversed.

Respectfully submitted.

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land and federal employees. In both cases, three-judge courts held the statutes invalid on the ground that they conflicted with the purpose of the federal program, which was to supplement local revenues, not to replace them.

[18] It is indisputable that the federal government has authority to fix the terms on which it disburses federal funds. See, *e.g.*, *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981). Of course, we do not suggest that the Payments in Lieu of Taxes Act places any constraints on a state's ability to control the use of *state* in lieu of taxes payments (*i.e.*, payments from the state to counties on account of tax-exempt state lands). Nor does the federal statute impose any limitations on the manner in which states perform their functions or on their relations with counties.

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